UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHILDREN'S HOSPITAL AND RESEARCH CENTER OF OAKLAND, INC., d/b/a CHILDREN'S HOSPITAL OF OAKLAND

Employer

and

NATIONAL UNION OF HEALTHCARE WORKERS Case 32-RC-5617
Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION - UNITED HEALTHCARE WORKERS - WEST
Intervenor

*For the Petitioner*: Latika H. Malkani, Atty., Siegel & Lewitter, Oakland, CA.
*For the Intervenor*: Manuel A. Boigues, Esq., Weinberg, Roger & Rosenfeld, Alameda, CA.
*For the Employer*: Bonnie Glatzer, Atty., Nixon Peabody LLP, San Francisco, CA.
*For the General Counsel*: Gary M. Connaughton, Esq., Region 32.

## ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

### STATEMENT OF THE CASE

Gerald M. Etchingham, Administrative Law Judge. The National Union of Healthcare Workers (Petitioner or NUHW) filed a petition on February 2, 2009, seeking to represent a unit of approximately 376 employees of Children's Hospital and Research Center of Oakland, Inc., d/b/a Children's Hospital of Oakland (Employer) who are currently represented by Service Employees International Union - United Healthcare Workers – West (Intervenor or SEIU-UHW). The processing of the petition was blocked for an extended period of time by unfair labor practice charges filed by the Intervenor. Once those blocking charges were resolved, pursuant to

the Regional Director's Decision and Direction of Election dated July 6, 2011[1] (General Counsel Exhibit[2] (GC Exh.) B-2(a)), a secret ballot election was conducted on August 17 in the following appropriate unit:

> All full-time and regular part-time, CCSTs, Central Processing Techs I, Central Processing Techs II, Critical Care Support Techs, Dishwashers, Food Service Workers, Stores Clerks, Head Housekeeping Aides, Housekeeping Aides, Functional Hospital Assistants, Linen Workers, LVNs, Patient Care Assistants, Rehabilitation Aides, Ward Clerks, Cooks, Medical Assistants, Clinical Lab Assistants I, Clinical Lab Assistants II, Clinical Lab Assistants III, Research Lab Assistants I, Research Lab Assistants II, Nuclear Med Techs, Sonographer Trainees, Sonographer Technician, Dedicated Lab Sonographers I, Dedicated Lab Sonographers II, ECG/Holter Techs, Lead Neuro Technician, OR Tech Trainees, OR Techs, Respiratory Care Practitioners I, Respiratory Care Practitioners II, RCP Transports, Equipment Technician, Pulmonary Function Techs I, Pulmonary Function Techs II, Pulmonary Function Techs III, Instrumentation Techs II during the payroll period ending June 25, 2011. EXCLUDED: All other employees, guards, and supervisors as defined in the Act (the Unit).

At the conclusion of the ballot count, the Tally of Ballots served on the parties showed the following results:

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|---|---|
| Approximate number of eligible voters | 376 |
| Number of void ballots | 1 |
| Number of votes cast for NUHW | 163 |
| Number of votes cast for SEIU – UHW | 159 |
| Number of votes cast for NEITHER | 5 |
| Number of valid votes counted | 327 |
| Number of challenged ballots | 3 |
| Valid votes counted plus challenged ballots | 330 |

(GC Exh. B-2(c).) The challenged ballots are sufficient in number to affect the results of the election.

Thereafter, Intervenor filed timely objections to the election on August 24. (GC Exh. B-2(d).) On November 17, the Regional Director issued his Supplemental Decision on Challenged Ballots and Objections and Notice of Hearing (decision on objections), setting for hearing the challenges to the ballots of Battsengel Cook, Ivonne Wilkes, and Reginal Wright; overruling Intervenor's Objections Nos. 1-4, 6, 7, 10-13, 15-17, 19, 23, 25-27, 29, 31, and 33-35; and setting Objections Nos. 14, 18, 20-22, 24, and 30 for hearing, as limited in the decision on objections; and the approval of Intervenor's request to withdraw Objection Nos. 5, 8, 9, 28, and

[1] All dates refer to 2011 unless otherwise indicated.

[2] At hearing there was some confusion whether to refer to the formal documents of record as Administrative Law Judge (ALJ) exhibits, Board exhibits or General Counsel exhibits. For this report and recommendations on objections, these exhibits will be referred to as GC Exhs. B-2(a) – (k), respectively.

32. (GC Exh. B-2(e).[3]) Hearing on those challenged ballots and objections was held in Oakland, California, on December 5 and 8.

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted relevant testimony. On the entire record,[4] including my observation of the demeanor of the witnesses[5], and after considering the closing briefs filed on December 22 by Petitioner and Intervenor[6] (P Br. and I Br., respectively), I make the following

## FINDINGS OF FACT AND DISCUSSION

### A. Background and Legal Overview

The Employer is an acute care facility that provides comprehensive health care services to children. It has two separate campuses located in Oakland and Walnut Creek, California. The SEIU has represented the unit employees for a number of years, but on February 2, 2009, the NUHW filed a petition seeking to represent the Unit who are currently represented by the SEIU.

Before I turn to the specific ballot challenge and objections and describe the evidence in support of them, I set forth the general standards I apply in deciding whether the results of the election should be set aside. As the Board stated in *Safeway, Inc.,* 338 NLRB 525 (2002):

> It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.,* supra, 941 F.2d at 328. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB,* 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974),

The proper test for evaluating conduct of a party is an objective one—whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg*., 316 NLRB

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[3] The decision on objections inadvertently omitted attachment Appendix B, a copy of Petitioner's flyer which contained an altered sample ballot which became the subject matter of Intervenor's Objection No. 18 referred to herein. At hearing I admitted Intervenor's Exhibit (I Exh.) I-2 which is a copy of the same flyer. I find it is interchangeable and an exact duplicate with omitted Appendix B.

[4] I hereby correct the transcript as follows: Tr. 140, line 17: "sites" should be "sides"; Tr. 240, line 11: "Intervenor Exhibit 2" should be "Petitioner Exhibit 1"; Tr. 241, lines 21-22: "Intervenor Exhibit 2" should be "Petitioner Exhibit 1"; Tr. 247, line 5: "it wasn't fault" should be "it wasn't his fault"; and Tr. 391, line 20: "ALJ" should be "Board Exhibits B-1 through B-2(k)".

[5] My findings reflect various credibility resolutions based, in the main, on the factors summarized by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388-390 (1949). All testimony and documentary evidence has been carefully considered. Evidence inconsistent with my findings is not credited. Added discussion of specific credibility determinations appear below.

[6] No closing briefs were timely filed by either the General Counsel or the Employer in this matter.

716 (1995). The Board in *Taylor Wharton Division,* 336 NLRB 157, 158 (2001), set forth several factors that should be considered:

> In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

## B. Stipulations

The parties' stipulated that the ballot of Battsengel Cook is not going to be counted. In addition the parties' further stipulated that the Intervenor was withdrawing its challenge to the ballot of Ivonne Wilkes so therefore her ballot will be counted for the Petitioner. (Tr. 136-37.) Consequently, the only remaining challenged ballot was the determinative ballot of Reginal Wright challenged by the Board. (Id.) Finally, the Petitioner and the Intervenor stipulate that Petitioner altered the NLRB's sample ballot for the election as evidenced in I. Exh. 2. (Tr. 154.)

As a result, this Report and Recommendations involve the resolution of one deciding challenged ballot and seven objections.

## C. The Challenged Ballot of Reginal Wright

The Board challenged the ballot of employee Reginal Wright on the basis that he arrived to vote after the polls closed during the morning session on August 17.

### 1. Facts

A number of witnesses including two Board Agents credibly described the events surrounding the four voting sessions on August 17, from 6 a.m. to 8 a.m., 12:00 p.m. – 1:00 p.m., 2:00 p.m. – 4:00 p.m., and 5:00 p.m. – 8:00 p.m. at the polling room in the basement of Employer's Outpatient Clinic annex to the main hospital (OPC). (Tr. 360-61.) I give greater weight to the testimony from the Board Agents as they are not aligned with any side in this case. Before the polls opened, the Board Agent in charge during the first morning polling session, Ms. Paloma Loya (Ms. Loya), announced to the six other people observing the session – two employee observers each supporting the Intervenor and the Petitioner and two additional Board Agents to assist in running the election – that because the wall clock in the polling room was a minute slow, Ms. Loya's cellphone would be the official timekeeping device for use at the session. No one objected to this designation and Ms. Loya showed her cellphone time reading 6:00 a.m. and 8:00 a.m., respectively, when she formally announced that the polls officially opened and later when the polls officially closed without objection. (Tr. 244-45, 259, 365-67, 417, 572, 595, and 598.)

When the polls closed there was nobody in line to vote and there was no one but Board Agent Harrison Kuntz (Mr. Kuntz) in the doorway leading into the room as Mr. Kuntz was leaving the polling room to retrieve the election sign on the outside door approximately 30 seconds to a minute after the pools were announced closed. (Tr. 244-45, 259, 365-67, 363-67, 571-73, 579-80, 586, 594-96, 598.)

It is undisputed that Reginal Wright (Mr. Wright) was running late in his attempt to vote at the first morning session on August 17 through no fault of Intervenor or Employer as Mr. Wright had been issued a traffic citation within minutes of the polls closing at 8 a.m. Mr. Wright was aware that there were multiple voting sessions yet admittedly rushed to the polling room and arrived rushed or breathing heavily anywhere from 30 seconds to over a minute after Ms. Loya announced the official closing of the polls at 8 a.m. and had begun the process of shutting down the polling room until the next session when Mr. Wright arrived at the door and after passing by Board Agent Kuntz outside the doorway to the polling room. (Tr. 246, 367-68, 379, 403, 410, 573-74, 579, 596-99, 608-09.)

As stated above, no earlier than 30 seconds to a minute after Ms. Loya announced the polls had closed, she saw Mr. Wright arrive and enter the polling room waiving his traffic citation. (Tr. 246, 368, 379, 574, 596-97, and 608-09). He was told by Ms. Loya that the polls had already closed because it was past 8:00 a.m. (Tr. 407, 596-97, 609-20). The witnesses explained that Ms. Loya "swooped" her cellphone across to show Mr. Wright and the observers that it was already 8:01 a.m. (Tr. 247, 369, 381-82, 407, 421-22, 568, 596-97, and 608-09). Ms. Loya told Mr. Wright that he could vote at a later session. Mr. Wright responded by saying that he was traveling out of town and could not make a later session. She then announced that Mr. Wright would be allowed to vote but that his vote would be characterized as a challenged vote because he arrived after the pools had closed. (Tr. 260, 368-69, 572-74, 595-97.)

Mr. Wright testified at hearing and offered an equivocal version of the facts without certainty as to some matters. For example, while he thought his wrist watch read 7:59 a.m. when he exited the elevators in the OPC basement to sprint to the polling room down the hall and to his left, he did not recall whether he was wearing a digital watch that read 7:59 a.m. or a non-digital watch. (Tr. 405, 410, 413.) No evidence was presented in support of the accuracy of Mr. Wright's watch on August 17 in relation to the official cellphone device time kept by the Board Agent.

While Mr. Wright initially explained that when he first arrived in the polling room he was told that he could not vote and someone told him that his vote was going to be challenged, he later changed his testimony to say that when he first arrived in the polling room a non-employee woman he did not recognize said to him: "[T]ime, or something like that." (Tr. 406-07.) Mr. Wright further explained that he next responded by asking the woman "what time is it? And in response she showed him her cellphone and he saw it read 8:01 a.m., one minute after the polls were scheduled to close as Mr. Wright knew before sprinting to the polling room. (Tr. 407, 410.) Mr. Wright was not credible when he altered his initial recollection of events and said that it took a couple of minutes for him to explain why he was late before seeing the 8:01 a.m. time on Ms. Loya's cellphone as this is outweighed by his initial version of the facts and the other witnesses' testimony. Finally, even Petitioner's own observer, Irma Villagomez-Miranda, opined that when

she first saw Mr. Wright at the door outside the polling room the morning of August 17 she immediately thought that he would not be able to vote. (Tr. 419 and 425.)[7] Only the non-credible, seemingly stilted, and rejected testimony of Petitioner's other observer, Ruth Kees, initially raised a factual dispute as to whether Mr. Wright arrived in time to vote before the polls closed at 8 a.m. which was outweighed by other witnesses including the two Board Agents' credible and consistent testimony referenced above.

2. Analysis

Generally, an employee who arrives at the polling place after the designated polling period has ended is not entitled to have his or her ballot counted, absent extraordinary circumstances, unless the parties agree not to challenge the ballot. *Laidlaw Transit, Inc.,* 327 NLRB 315, 315 (1999); *Monte Vista Disposal Co*., 307 NLRB 531, 533 (1992). I find that no such agreement exists in this case.

The Petitioner argues that the submitted evidence shows that Mr. Wright arrived prior to the official announcement by Board Agent Loya that the polls were closed.[8] Intervenor, on the other hand, argues that Mr. Wright arrived after the polls closed and that Board Agent Loya informed Mr. Wright that he could return to vote during either the afternoon or the evening sessions, but Mr. Wright declined that offer. Under these circumstances, Intervenor argues that Petitioner has failed to demonstrate that there are sufficient extraordinary circumstances to overcome a challenge to a ballot based on tardiness.

I find that the credible testimony of the Board Agents, Mr. Wright's initial testimony, and several observers support a finding that Mr. Wright arrived at the designated polling room after 8:00 a.m., the end of the designated polling period for the morning session, and after Board Agent Loya had already announced that the polls had closed based on the 8:00 a.m. time displayed on her official time piece cellphone that had been properly designated by her with the agreement of the observers during the pre-election meeting. As stated above, no earlier than 30 seconds to a minute *after* Ms. Loya announced the designated polling period had ended at 8:00 a.m., Mr. Wright arrived and entered the polling room waiving his traffic citation. (Tr. 246, 368,

[7] I reject Petitioner's untrue assertion that Ms. Villagomez-Miranda testified that she recalled "seeing Mr. Wright enter the [polling] room *before* the Board agent announced that the polls were closed." P Br. at 16 (Emphasis mine.) Instead, the questionable testimony from Ms. Villagomez-Miranda is that Mr. Wright had not entered the polling room by the time that Board Agent Loya announced that the polls had closed. (Tr. 425).

[8] Petitioner has abandoned its earlier argument that Mr. Wright's ballot should be counted because, even assuming he was late, he was delayed due to exceptional circumstances. I agree with the Regional Director's underlying analysis and also find that there were no "exceptional circumstances" which delayed Mr. Wright's arrival at the polls on August 17 because he was pulled over by a police officer and issued a traffic citation at 7:45 a.m. for having tinted windows while he was driving to the polling location through no fault of the Intervenor or the Employer. See *Monte Vista Disposal Co.,* 307 NLRB 531 (1992), in which the Board adopted "a bright line rule terminating the balloting at the conclusion of the voting period." The Board reasoned that the "exceptional circumstances" exception to this bright-line rule should be limited to circumstances such as where one of the parties was responsible for the tardiness of the late-arriving voter - a situation not present in the case before me.

379, 574, 596-97, and 608-09). As such, I find Mr. Wright to be a tardy, late-arriving voter. He was not in line waiting to vote when the polls closed. The Petitioner did not present any credible supporting evidence showing that Mr. Wright's own wristwatch was in synch with Ms. Loya's cellphone, the official designated timing device, or that Mr. Wright entered the polling room before the polls were announced closed. Consequently, Mr. Wright's determinative challenged vote is sustained because he arrived after the polls had closed in the morning session and will not count. Thus, a new election is necessary.

D. Intervenor's Objections Nos. 14, 20, and 21

(14) The employer and Petitioner engaged in surveillance of employees as they were voting in the National Labor Relations Board conducted election, interfering with the laboratory conditions necessary for the conduct of a fair election.

(20) The employer and Petitioner engaged in surveillance of voters at or near the election area, interfering with the laboratory conditions necessary for the conduct of a fair election.

(21) The employer's managers held meetings in the polling area during voting times, interfering with the laboratory conditions necessary for the conduct of a fair election.

1. Facts

Petitioner's organizers, together with its employee supporters such as Jackqueline Patrick, spent a considerable amount of time on election day stationed at or near the bench by the main hospital entrance. (Tr. 166, 169, 175-79, 199, 236-38, 273-77, 329-33, 348, 434, 440, 442, 445, 447, 518, 521, and 547; and P. Exh. 4.7.) Ms. Patrick observed that this even occurred when the polls were open during the afternoon and evening polling sessions on August 17. (Tr. 547-49.) Glora Mulder, a pro-Intervenor employee at Employer, says she stood at the corner of 52nd St. and the OPC sidewalk with other Intervenor organizers and staff and other pro-Intervenor employees after she voted at 6:10 a.m. (Tr. 268; P. Exh. 4.3.) She also agreed that if someone was looking from the sidewalk entrance of OPC (P. Exh. 4.12) toward the entrance of the main entrance where the bench and Petitioner staff was mostly located on August 17, they would be looking at where Ms. Mulder and other Intervenor employees and officials were standing such that views of the sidewalk nearest the OPC entrance (P. Exh. 4.12) would occasionally be blocked by the Intervenor group adjacent to 52nd Street if one was looking from the main hospital bench (P. Exh. 4.3.) (Tr. 271-72.) In addition, because the OPC entrance was actually to the right of the OPC sidewalk as depicted by the semi-round roof pillar in P. Exh. 4.12, there was no direct view of the entrance to the OPC where the polling room was located from the bench by the hospital's main entrance or from the smoking area frequented by Ms. Roe as shown in P. Exh. 4.3.[9]

There were three routes that voters could take to get to the polling room in the basement of the OPC on August 17 from the main hospital. They could use the pedestrian bridge on the third floor of the main hospital that extended over 52nd Street to the 3rd floor of the OPC (P. Exh.

[9] This is contrary to Intervenor's factual assertion contained in its closing brief at page 5.

4.8), they could exit the main entrance of the hospital and use the crosswalk over 52nd street to the OPC sidewalk, turn right and walk approximately 20 feet through the double-door entrance to the OPC (P. Exhs. 4.9 and 4.10) and either take the elevators or the stairs down to the basement where the polling room was located. In addition, when people exited the main entrance of the hospital and used the crosswalk to walk to the OPC sidewalk, it was uncertain whether these people would be going to vote at the OPC, work at the OPC, go to the parking garage adjacent to OPC, or to the hospital's financial office located across from the OPC. See I. Exh. 1, P. Exhs. 4.3 and 4.12.)

Sharrion Marshall, an Intervenor supporter, also testified that I. Exh. I-3, photos she took identified as the bulletin board as of August 17 that is downstairs in the basement of the OPC. (Tr. 319). When you come off the elevators, the bulletin board is to your right in a glass case. (Tr. 320.) To get to polling room, one must go down a short hallway and then take a left. (Tr. 321.) One also passes other rooms on the way to the polling room including Conference room A on the right. (Id.)

2. Analysis

In support of Objections Nos. 14 and 20, Intervenor alleges that on election day several named NUHW staff members stationed themselves near the polling location in positions from which they could "visibly see, keep track, and count who voted in the election." Intervenor asserts that these NUHW staff members were located at the entryway of the voting location, which compelled voters to walk past them in order to enter the voting booths.

In addition, in support of Objection No. 21, Intervenor alleges that the Employer's managers held all-day management meetings in conference rooms adjacent to the polling area at the Employer's Primary Care building. Intervenor also alleges that the managers who attended these meetings could observe employees who were entering the polling area to cast their ballots.

The Petitioner argues that the Intervenor did not satisfy its burden and prove, among other elements, that the eligible employees had to pass by the Petitioner's staff near the bench outside the main hospital in order to vote. Moreover, Petitioner further argues that there is insufficient evidence that Petitioner's staffers maintained a continuous presence such that eligible voters working in the main hospital had to pass by these Petitioner staffers to vote at OPC as eligible voters could easily have used the pedestrian bridge to go to the polling room at the OPC basement rather than pass any Petitioner staffers outside the main entrance bench. Also, there is no evidence that Petitioner's staffers established any presence inside the OPC building while the polls were open.

Finally, Petitioner argues that there was no evidence that any managerial meeting occurred during the times the polls were open. (Tr. 339-40; I. Exh. 4.) In addition, there is insufficient evidence that any manger was able to see any employee while they voted or stood in line to vote in the polling room.

In *J.P. Mascaro and Sons,* 345 NLRB 637, 639 (2005), the Board noted that the continued presence of a union official standing near the polling area for the entire day where employees had to pass through to vote and where the union representatives observed employees

waiting in line to vote interfered with an election. I adopt the Petitioner's arguments based on the specific facts in this case particularly because the questioned conduct on the part of the Petitioner's staffers took place sufficiently removed from the polling area in the OPC basement that it was virtually impossible to prove that the eligible voters had to pass by the Petitioner's staff near the main hospital in order to vote or to even identify who the eligible voters were since there were several other destinations for someone walking past the Petitioner's staff other than to the polling room at a location out of sight of the Petitioner's staff. No improper surveillance by Petitioner's staff at the polling area was proven in this case.

The Board has also found that the continued presence of employer representatives in an area where employees had to pass through to vote and where the managers observed employees waiting in line to vote interfered with an election. *ITT Automotive,* 324 NLRB 609 (1997); *Electric Hose & Rubber Co.,* 262 NLRB 186 (1982); *Performance Measurements Co.,* 148 NLRB 1657 (1964). However, where there is insufficient evidence to establish that employees had to pass by the employer's representative in order to vote, the Board has found that even a continued presence by an employer representative outside a polling place does not constitute objectionable surveillance. I adopt the Petitioner's arguments here under the facts referenced above. Moreover, I need not resolve this factual issue because there is no evidence that any of Employer's managers were actually observing anyone going into or out of the polling area as opposed to there being just an open door with no direct sight to the polling room and noise coming from one of the manager's meetings after the polls had closed. In any event, these manager meetings took place outside the polling session periods and these meeting rooms were located too far away from the voting area for these events to have had an appreciable effect on the outcome of the election. See *Patrick Industries,* 318 NLRB 245, 256 (1995); *Roney Plaza Management Corp.,* 310 NLRB 441, 447 (1993). As a result, I recommend overruling Objections Nos. 14, 20 and 21.

### E. Intervenor's Objection No. 18

> (18) The Petitioner altered a NLRB document (sample ballot) which makes it appear that the NLRB supported it.

#### 1. Facts

During the critical period, the Petitioner widely disseminated throughout the Unit written campaign materials. Petitioner's flyer identified as I. Exh. I-2 was seen posted in break rooms on 5th floor in Employer's main building and in primary care building and given to Ms. Carpenter. (Tr. 240-41.) On inspection, I find that the Petitioner's flyer at issue here listing polling times and sessions and containing a suggestive ballot in favor of Petitioner, the objectionable flyer at issue here (I. Exh. I-2), contains a Xeroxed copy of an NLRB sample ballot with an "X" marked on the box next to Petitioner's name. I recognize and agree that the Petitioner and the Intervenor have stipulated that Petitioner altered the NLRB's sample ballot for the election as evidenced in I. Exh. I-2. (Tr. 154.)

Significantly, the altered sample ballot on the leaflet did not contain the Board's explicit standard disclaimer language. Instead, on the flyer, the following text appears below the reproduced ballot: "The NLRB does not endorse any choice in this election. Any markings that

you may see were no [sic] put there by the NLRB." (I Exh. I-2.) Therefore, the defective disclaimer was altered in the following ways:

1. The disclaimer leaves out the language "on any sample ballot have not".
2. The disclaimer uses the acronym "NLRB" in two places rather than the more descriptive "National Labor Relations Board."
3. The disclaimer is not on the sample ballot itself, as required by the Board in *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007).
4. The disclaimer is barely readable because the font size is miniscule.

(Intervenor's Exhibit I-2; Board Exhibit B-1 at 6 (Appendix B); and B-2(e) at 22-23.)

Glora Mulder saw Petitioner's flyer (I. Exh. I-2) before – the first time being on the table in the EVS break room on first floor of main hospital couple of days before the election. (Tr. 284.) Ms. Marshall, an Intervenor official, also saw the flyer a couple days before the election in the central processing break room. (Tr. 335.) Also someone from food processing dept brought it to her in cafeteria. (Tr. 336.) Shaaron Brown, a pro-Intervenor employee of Employer, first saw the flyer a week before the election in the food service break room. (Tr. 344-45.)

2. Analysis

The Intervenor argues that applying the Board's reasoning in the *Ryder* case to the altered sample ballot used by Petitioner in its pre-election flyer mandates that, because the language is not on the altered ballot exactly as required, this is *per se* objectionable. Moreover, given that there is ample evidence that this flyer was widely distributed prior to the election, the distribution of this flyer is sufficient to set aside the election.

Petitioner argues that the NLRB's standard disclaimer language was replaced with "slightly modified disclaimer language." Stated differently, Petitioner argues that the alterations from the approved sample ballot disclaimer are *de minimis* and employees would not be misled into believing that the Board favors a particular party to an election in this case. Petitioner concludes by adding that here Petitioner did not simply delete disclaimer language in its entirety in a manner designed to intentionally mislead employees because only a *de minimis* portion of the disclaimer was omitted.

In *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007), the Board revised the Board's official election ballot to include the following disclaimer language:

> "The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board."

The Board stated that in future cases it would "decline to set aside elections based on a party's distribution of an altered sample ballot, provided that the sample ballot is an actual reproduction of the Board's sample ballot." However, if a party distributed an altered sample ballot from which the disclaimer language was deleted, the Board would consider the deletion intentional and would deem the altered sample ballot to be objectionable.

In the instant case, Intervenor has provided evidence that the reproduced sample ballot was not an actual and identical reproduction of the Board's sample ballot. It is an altered sample ballot which must contain explicit disclaimer language referenced above. In particular, I note that the altered sample ballot distributed by Petitioner deletes the Board's explicit standard disclaimer language, and instead replaces it with alternative language created by Petitioner. The distribution of such altered ballots will be treated as *per se* objectionable. See *Ryder Memorial Hospital*, 351 NLRB 214, 216, fn 13. I recommend that Objection No. 18 be sustained.

F. Intervenor's Objection No. 22

(22) The Petitioner promised eligible voters that they would pay less dues and/or not have to pay initiation fees if they voted for NUHW.

1. Facts

Ms. Carpenter, a pro-Intervenor medical assistant at Employer, said that she had a conversation with her unnamed co-workers who supported the Petitioner and handed out pro-NUHW flyers and stated to her either a month or a few weeks before the election that "if we voted for NUHW, our union dues would be cheaper…." (Tr. 239.) Also, about one week before the election, Ms. Glora Mulder, a pro-Intervenor environmental worker at Employer spoke to Petitioner organizer Faye Roe with a few other co-workers around her when Roe said that "if we join NUHW, we wouldn't have to -- our dues would be cheaper." (Tr. 286.) A second time in the cafeteria when Mulder was alone with Roe, Roe repeated the same "about coming to join NUHW, NIUs, the dues would be cheaper." (Tr. 287.) Ms. Roe testified that she had conversation with employees about union dues but that she never made any conditional offers, and actually made clear to employees that the promise of lower union dues was unconditional and often used a flyer (P. Exh. 1) to make clear that the offer was available to all employees. (Tr. 509-15.)

Also in support of Objection No. 22, Intervenor offered a copy of what is presumably an NUHW-made flyer (P. Exh. 1) that states "NUHW dues will be much less"; and "Any member who works in a bargaining unit where the dues rate under SEIU was based on a flat rate rather than a percentage based system shall immediately have their dues reduced by twenty five percent when their bargaining unit becomes covered by a NUHW collective bargaining agreement." P. Exh. 1.

2. Analysis

The Supreme Court has held that where a union offers to waive initiation fees on condition that employees sign authorization cards prior to the election, such conduct is grounds for setting aside an election. See *NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973). The Court reasoned that this offer was akin to a financial bribe to induce employees to sign authorization cards. However, where the initiation fee waiver offer remains available to employees after the election regardless of whether they signed cards or the way they voted, the offer is not objectionable. See *L.D. McFarland Co*., 219 NLRB 575 (1975).

In the instant case, the flyer which references cheaper union due if one joins the Petitioner (P. Exh. 1) does not condition waiver of the initiation fee on the signing of an authorization card. Rather, it states that all employees will pay lower dues if NUHW wins the election, and it does not limit this offer only to those employees who vote for NUHW. Therefore, the flyer as campaign material is not grounds for setting aside the election.

As for the statements made to Ms. Carpenter and Ms. Mulder, their testimony did not equate to an offer of lower union dues being conditioned on a vote for the Petitioner. I find that Petitioner's offer of lower union dues was not conditioned or limited only to those eligible voters who support NUHW but applied not only to those voting in the election but also remained for those who become members of the NUHW after the election. I further find that Intervenor did not satisfy its burden of proving that Ms. Carpenter's unidentified co-workers were Petitioner's agents who affirmatively promised lower dues conditioned on an employee's act of voting for the NUHW at the upcoming election. I find that neither the language in the flyer (P. Exh. 1) nor the statements made by Ms. Carpenter's unidentified co-workers or Ms. Roe to Ms. Mulder constitute objectionable conduct. I recommend that Objection 22 be overruled.

### G. Intervenor's Objection No. 24

> (24.) The Petitioner took photographs or videotapes of Union supporters engaged in protected, concerted activity.

#### 1. Facts

Glora Mulder and Shaaron Brown, two employees who support the Intervenor, testified that on August 17 while the polls were open Petitioner's organizers Faye Roe, Ching Lee, and Pat Alvarez stood by the main entrance and took cellphone pictures of 6-7 employee supporters of the Intervenor who were across the street engaged in protected concerted activity. [10] (Tr. 278-83, 310, 313, 315, 349-50, 352-54, and 358.)

Faye Roe, Petitioner's organizer, testified that while she has a cellphone with camera capabilities, she was not using her cellphone to take photographs of Intervenor's group gather at the corner of the OPC sidewalk and 52nd Street on August 17. Instead, Ms. Rowe unbelievably testified that she was holding her cellphone extended out from her body for purposes of reading her emails and text messages rather than taking pictures. (Tr. 450-52.) I do not find this testimony convincing. Ms. Roe seemed more set on making a case than giving accurate testimony and her testimony is contradicted by the testimony of other witnesses.

#### 2. Analysis

In *Mike Yurosek & Sons, Inc.*, 292 NLRB 1074 (1989), the Board held that it was objectionable conduct for a union agent to photograph employees as they entered the plant,

[10] Intervener also argues that Petitioner's organizers took photographs of eligible voters from the bench near the main hospital entrance but, as explained above for Objections Nos. 14 and 20, there is no way of knowing whether people on the OPC sidewalk were eligible voters or not as this photograph location was not near the polling area, there were at least 3 ways to get to the polling room, and there were several other reasons for someone to be on the OPC sidewalk other than to go vote.

absent a contemporaneous legitimate explanation being given to the employees being photographed. Similarly, in *Robert Orr – Sysco Food Services*, 334 NLRB 977 (2001), the Board stated that it is well-established law that absent proper justification, photographing employees as they engage in protected concerted activity is objectionable conduct that warrants the direction of a new election unless the impact on the election is *de minimis*.

Given Petitioner's relatively small margin of victory[11], Petitioner's conduct viewed objectively, had a reasonable tendency to interfere with unit employees' free and uncoerced choice in the election. Accordingly, I find that because the photographs were taken before the closing of the polls, this conduct could have affected the election results. I recommend that Objection No. 24 be sustained.

H. Intervenor's Objection No. 30

(30.) The employer, by its agents, disparately escorted Union representatives through the facility.

1. Facts

Felipe Garcia, Intervenor's organizer, credibly testified that initially on August 17 he was not allowed entrance to Employer's facility without a security escort after he received a visitor's badge from the ambassador's desk. (Tr. 165-66.) Later on August 17, Mr. Garcia and other Intervenor representatives, including Mr. Davere Godrey, were given free reign of the hospital, and were allowed to move freely without any escort as they accessed the upper nursing floors in the presence of Employer managers and came in and out of the main hospital through the day. (Tr. 188-91, 210-11, and 221.) He was not convincing when he paused and testified that Petitioner's organizer, Pat Alverez, was allowed entrance into Employer's facility without an escort that same date as there is no evidence that, like Mr. Garcia, Ms. Alvarez also was required an initial security escort and after receiving a visitor's badge from the ambassador's desk, she also had free reign of the main hospital later in the day like Mr. Garcia and other Intervenor staffers.

Employer's employee labor relations manager, Brenda Husband, credibly testified that the unchanged escort policy between Employer and Intervenor since the spring of 2009 through August 17 involved the ambassador or a security official normally contacting Ms. Husband and letting her know the identity of the Intervenor's representative seeking access to some part of the facility like the cafeteria. Upon notice, Ms. Husband will request a security guard escort for Intervenor's representative to the desired location. If she is away from her desk then a message is left. (Tr. 386-87.)

Ms. Husband further explained that on average of a couple times a week over the past 6 months Intervenor would seek access approximately twice a week. She further stated that no one from the Intervenor had complained about any change to the escort policy from June 2011 through the date of hearing and Ms. Husband disagreed with Mr. Garcia's characterization that Employer's escort policy had changed over the three months leading to the August 17 election

[11] As stated above, because I am also sustaining the challenge to Mr. Wright's late vote, Petitioner cannot win the August 17 election and a new election is recommended.

such that Employer did not require a security escort for Intervenor's representatives from June 2011 through August 16, 2011. (Tr. 387-89.)

2. Analysis

Regarding Objection No. 30, Intervenor argues that on the day of the election, the Employer disparately enforced its escort policies by requiring representatives from Intervenor to be escorted when they visited the Employer's facility while allowing representatives of Petitioner access to the facility without an escort.

Petitioner argues that the escort policy on August 17 was applied equally to both union staffers with only the initial access requiring a security escort with free reign of the main hospital using the visitor's pass after the initial access request.

First, I point out that both Intervenor and Petitioner conducted vigorous campaign activities. Both, at times, violated the Employer's rules. I conclude, however, that the evidence does not show that the Employer gave preferential treatment to the Petitioner. To the contrary, though its escort policy may very well have been less strict leading up to the election, the Employer did the best it could follow the law and maintain its neutrality in the election. As it was required to do, the Employer continued to grant the Intervenor access rights consistent with its contractual obligations. The election day escort policy applied equally to Intervenor and Petitioner with some minor exceptions - when a union staffer first arrived at the main hospital for access, they were required to go to the ambassador's desk, identify themselves, receive a visitor's badge and wait for Ms. Husband to approve their entrance with a security guard escort to their destination usually to the cafeteria. For the remainder of election day access, the visitor's badge alone provided access for the union staffers. I find that this does not constitute objectionable conduct. I recommend that Objection 30 be overruled.

I. Intervenor's Motion for Reconsideration of Order Revoking Intervenor's Dec. 2 Subpoena Duces Tecum to Petitioner

Intervenor renews its argument from hearing and seeks to reopen the record after I reconsider my ruling granting Petitioner's petition to revoke Intervenor's subpoena duces tecum personally served the afternoon of Friday, December 2 requesting Petitioner's production of documents on the immediately following Monday, December 5 at 9 a.m. (See Tr. 205.)

Intervenor does not provide any newly acquired evidence or legal theory as to why the subpoena should not be quashed. Most of the requested documents are now irrelevant as moot based on my ruling in favor of the challenged ballot of Mr. Wright and my sustaining Objections Nos. 18 and 24 herein.

Intervenor received notice on November 25 that hearing would go forward in this matter on December 5 but waited to serve the Dec. 2 subpoena until there was no longer a reasonable time for compliance. I deny Intervenor's request for reconsideration and rule that the subpoena must remain quashed after reconsideration as it has become moot, in part, and because Intervenor failed to allow Intervenor a reasonable time to comply. See Board Rules, Section

102.31(b); *Brink's, Inc*. 281 NLRB 468, 468 (1986); Federal Rules of Civil Procedure Rule 45(c)(3)(A)(i).

## RECOMMENDATION

Based on the above, I recommend that Mr. Wright's determinative challenged vote is sustained and will not count and that Objections Nos. 18 and 24 be sustained and that Objections Nos. 14, 20, 21, 22, and 30 be overruled. Accordingly, I recommend that the Board election in Case 32-RC-5617 be set aside and a new election be held.[12] Inasmuch as I have recommended that Mr. Wright's deciding challenged vote is sustained and will not count and that Objections Nos. 18 and 24 be sustained, I recommend that the August 17 secret ballot election held in Case No. 32-RC-5617 be set aside and that the representation proceeding be remanded to the Regional Director of Region 32 for the purpose of conducting a second election.

Further, and in accordance with *Lufkin Rule Co.*, and *Fieldcrest Cannon, Inc.*, 327 NLRB 109 FN 3 (1998), I recommend that the following notice be issued in the Notice of Second Election in Case No. 32-RC-5617[13]:

**NOTICE TO ALL VOTERS**

The ballot election held August 17 was set aside because the National Labor Relations Board found that certain conduct of National United Healthcare Workers interfered with the exercise of a free and reasoned choice among employees in the following unit:

> All full-time and regular part-time, CCSTs, Central Processing Techs I, Central Processing Techs II, Critical Care Support Techs, Dishwashers, Food Service Workers, Stores Clerks, Head Housekeeping Aides, Housekeeping Aides, Functional Hospital Assistants, Linen Workers, LVNs, Patient Care Assistants, Rehabilitation Aides, Ward Clerks, Cooks, Medical Assistants, Clinical Lab Assistants I, Clinical Lab Assistants II, Clinical Lab Assistants III, Research Lab Assistants I, Research Lab Assistants II, Nuclear Med Techs, Sonographer Trainees, Sonographer Technician, Dedicated Lab Sonographers I, Dedicated Lab Sonographers II, ECG/Holter Techs, Lead Neuro Technician, OR Tech Trainees, OR Techs, Respiratory Care Practitioners I, Respiratory Care Practitioners II, RCP Transports, Equipment Technician, Pulmonary Function Techs I, Pulmonary Function Techs II, Pulmonary Function Techs III, Instrumentation Techs II during the payroll period ending June 25, 2011. EXCLUDED: All other employees, guards, and supervisors as defined in the National Labor Relations Act.

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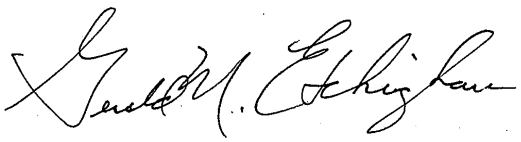
[12] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and Recommendations on Objections. Exceptions must be received by the Board in Washington DC by January 11, 2012. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director of Region 32. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

[13] I deny Intervenor's request for additional extraordinary remedy against Employer and the Petitioner. I have not found that Employer acted in an objectionable manner in this case and the extraordinary remedy aimed at the Petitioner is unsupported by the evidence and case law.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Dated at Washington, DC: December 28, 2011



Gerald M. Etchingham
Administrative Law Judge